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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 49

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

R. DOUGLAS STUART,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

HERBERT POPE,
GEORGE I. HAIGHT,
BENJAMIN M. PRICE,
Counsel for Respondent.

WILLIAM D. MCKENZIE,
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Argument.

The facts in this case differ very slightly from the facts in *Helvering* v. *John Stuart*, No. 48, to be presented to this Court at the same time as this case, and the argument in our brief in that case applies in this case, so that it is unnecessary to repeat here the contentions made in that brief. We will limit our argument here to a single question not raised by the facts in the other case.

The only question in this case which is not in the John Stuart case is whether, in view of the minority of the grantor's children, the income of the trusts is taxable to him. In other words, was the income which was added to principal for the benefit of the grantor's children in reality his own?

Where income is *actually* used for the grantor's benefit it has been held by this Court to be taxable to him. But where the income *might have been* used for the support or education of minor children of the grantor but was not actually so used, such income is not taxable to the grantor.

Commissioner v. *Grosvenor*, 85 F. (2d) 2.

Black v. *Commissioner*, 36 B. T. A. 346 (acquiesced in by Commissioner, Cumulative Internal Revenue Bulletin, 1937-2, p. 3).

Tiernan v. *Commissioner*, 37 B. T. A. 1048 (acquiesced in by Commissioner, Cumulative Internal Revenue Bulletin 1939-1, p. 35).

Chandler v. *Commissioner*, 41 B. T. A. 165, 178.

Wolcott v. *Commissioner*, 42 B. T. A. 1151 (acquiesced in by Commissioner, Cumulative Internal Revenue Bulletin, 1941-1, p. 11).

Examining the facts in the present case in the light of these decisions, we find that of the income here involved ($37,162.91 for 1934 and $25,831.15 for 1935) only $1,391.50 in 1934 and $1,882.50 in 1935 were distributed to a minor beneficiary. The rest was accumulated and added to principal. Even economically speaking, none of the income thus accumulated was the petitioner's income.

The contention of the government that possibility rather than actuality governs was rejected by the Circuit Court of Appeals for the Sixth Circuit in *Suhr* v. *Commissioner*, 126 F. (2d) 283, 286, citing *Commissioner* v. *Grosvenor*, *supra*, and the decision of the Circuit Court of Appeals in the present case.

Counsel admit, (Brief, 13) that under the Commissioner's own formal ruling following the decision in *Black* v. *Commissioner, supra,* this accumulated income is not taxable to the grantor merely because the trustees might have used it for the support of the children. Counsel contend, however (Brief, 12, 13) that this income is taxable under section 22 (a) and *Whiteley* v. *Commissioner,* 120 F. (2d) 782, and thus infer that there is a conflict between the decision in the present case and the decision of the Circuit Court of Appeals for the Third Circuit in that case.

The court below, however, correctly distinguished the *Whiteley* case on the ground that

> "there were clear reservations of rights to the grantor which might well be considered as bringing the trusts within the provisions of section 167 as well as 22 (a). * * * It should be further noted that that court also found that the settlor could have received the entire income and applied it to the support of his minor children, which he did not choose to do, and it further found that the settlor controlled the use of the money, neither of which rights did the settlor reserve in either of these trusts" (R. 56).

The court below held that the amounts actually distributed to the grantor's son might have been used by him for his support or education and were taxable to the grantor because no proof was made as to the use of those amounts, but that the amounts added to principal of the four trusts could not then be used for such purposes, and hence were not taxable to him.

In the *Whiteley* case the grantor was specifically given the right to obtain and use income of the trusts for the support of his minor children, while in the present case the three trustees, who represented the beneficiaries, determined whether and to what extent income was to be paid to a minor or applied for his support or accumulated and added to principal. In the *Whiteley* case the grantor, who

was not the trustee, had sole control of the income during the minority of his children and could act entirely in his own interest.

We submit that the judgment should be affirmed.

HERBERT POPE,
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WILLIAM D. MCKENZIE,
Of Counsel.
October 16, 1942.